79236-4

NO. 23698-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON **DIVISION THREE** STATE OF WASHINGTON, Respondent, ν. ALYSSA KNIGHT, Appellant. ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY The Honorable Jerome J. Leveque, Judge SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

- 1. The trial court erred in entering judgment and in sentencing appellant on counts I and II, where only one conspiracy occurred.
- 2. The conviction for count II violated appellant's right to be free from double jeopardy.
- 3. The offender scores for counts I and III erroneously include two points for count II.

<u>Issues Related to Supplemental Assignments of Error</u>

- 1. Where this Court has held that the identical facts supporting the conspiracy convictions in counts I and II were only one offense, does double jeopardy bar the conviction for count II?
- 2. Is vacation of count II and resentencing on counts I and III the required remendy?

B. SUPPLEMENTAL STATEMENT OF THE CASE

In a second amended information filed May 3, 2004, the state charged appellant Alyssa Knight with three counts:

- I Conspiracy to Commit Second Degree Robbery;
- II Conspiracy to Commit First Degree Burglary; and
- III Second Degree Murder, while armed with a firearm.

CP 11-20; 1RP 2-18.1

This brief refers to the transcripts as follows: $1RP - \frac{5}{3}/04$ & $\frac{12}{14}/04$; $2RP - \frac{7}{7}/04$; $3RP - \frac{11}{5}/04$.

Knight pled guilty as part of a plea agreement. CP 35-37. The plea agreement stated "[t]he parties will be free to argue for any sentence allowed by law." CP 35. Knight agreed to cooperate with the state's prosecution of several codefendants. CP 36-37. Knight performed her part of the bargain by assisting the investigation and by testifying for the state at the codefendants' trials. CP 33-34; 1RP 32-35; 2RP 4-5, 10-12, 15-16; 3RP 5-10

As part of the plea form, Knight agreed that the court would review the statement of probable cause to provide a factual basis for the offense. CP 18. The statement of probable cause (CP 4-7) is attached as appendix A.

Knight was sentenced and appealed. Her appointed counsel initially filed an Anders brief. Following this Court's initial review, Commissioner McCown of this Court issued a ruling appointing substitute counsel:

being of the opinion a potential issues exists in this case relative to the calculation of Ms. Knight's offender score and the sentencing range, the motion to withdraw is granted and the Clerk of this Court is hereby directed to appoint new counsel for Ms. Knight to brief the issue regarding the offender score and sentencing range.

Ruling dated October 17, 2005.

Undersigned counsel filed the brief of appellant on November 30, 2005. The brief argued that Ms. Knight's offender score was miscalculated because the scores on counts II and III should be three points, not four

points. The argument asserts that count I is not a "violent offense" and therefore should only count one point in the offender scores for counts II and III. Brief of Appellant (BOA) at 7-9. The brief criticizes an arguably contrary decision from Division One in <u>State v. Becker</u>, 59 Wn. App. 848, 801 P.2d 1015 (1990). BOA at 12-24.

On January 3, 2006, the state filed a three-page Brief of Respondent. Two pages assert that <u>Becker</u> controls this issue. BOR at 2-3.

On January 31, 2006, this Court issued its decision in <u>State v. Dione J. Williams</u>, ___ Wn. App. ___, __ P.3d ___ (No. 23124-1-III, Jan. 31, 2006).² In <u>Williams</u>, this Court held that the convictions for (1) conspiracy - second degree robbery, (2) conspiracy - first degree burglary, and (3) conspiracy - first degree robbery, are <u>one</u> offense. <u>Williams</u>, at 1, 19-22. The <u>Williams</u> court reversed the first two conspiracy convictions, holding that the conspirators had one plan to commit one robbery. <u>Id</u>.³

Because no publication page references are yet available for <u>Williams</u>, this brief refers to paragraph numbers. For the Court's convenience, a Westlaw copy, downloaded February 26, 2006, is attached as appendix B. 2006 WL 224278.

The ACORDS database shows that oral argument was heard in <u>Williams</u> on October 17, 2006, the same day Commissioner McCown issued the ruling appointing new appellate counsel for Ms. Knight. The Spokane County Prosecutor's office represents the state in both cases.

The holding from <u>Williams</u> is relevant here. Knight was a codefendant with Williams. Knight's case involves identical substantive facts. As part of the plea agreement, Knight provided the state substantial assistance in prosecuting several co-defendants. Knight testified at two trials and put herself and her family in substantial risk. There is no question that she fulfilled her side of the plea bargain. CP 33-34; 1RP 32-35; 2RP 4-5, 10-12, 15-16; 3RP 5-10.

C. <u>ARGUMENT</u>

THE COUNTS I AND III OFFENDER SCORES AND STANDARD RANGES ARE ERRONEOUS. REMAND FOR RESENTENCING IS REQUIRED.

In her opening brief, Knight argued that the counts II and III offender scores are erroneous because count I should only be scored as one point. BOA at 5-9. Following this Court's decision in Williams, Knight argues count II should be vacated and not scored at all; the scores on counts I and III are therefore even lower.

The state and federal constitutions prohibit placing someone in jeopardy twice for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). In Bobic, the court held that the "unit of prosecution" under Washington's criminal conspiracy statute is "an agreement and an overt act rather than the specific criminal objects of the conspiracy." Bobic, at 265-66 (construing RCW)

9A.28.040(1)). The proper remedy is to vacate the erroneous multiple convictions and resentence on the remaining proper count. <u>Bobic</u>, at 267.

The <u>Bobic</u> court also held that this double jeopardy claim may be raised for the first time on appeal. <u>Bobic</u>, at 257 (citing RAP 2.5(a)(3)). Knight's plea agreement did not waive the right to appeal the double jeopardy violation. CP 13-14. <u>See generally, State v. Cox</u>, 109 Wn. App. 779, 782, 37 P.3d 1240 (2002) (guilty plea does not waive double jeopardy claim, citing <u>Menna v. New York</u>, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975)); <u>accord In re Restraint of Butler</u>, 24 Wn. App. 175, 178, 599 P.2d 1311 (1979).

In <u>Williams</u>, this Court applied <u>Bobic</u> and held that there was one conspiracy to rob Cole. <u>Williams</u>, at ¶¶19-22. The underlying facts in <u>Williams</u> are identical to those here, involving events occurring on September 23-26, 2003. A group of people including Knight and Dione Williams planned to "do a lick" on the victim, Arren Cole. "Do a lick" meant to rob Cole of his valuables. <u>Williams</u>, at ¶¶ 3-6; CP 4-7.

The group was not particularly efficient in their execution of the robbery plan. They first discussed it on September 23rd. CP 5; Williams, at ¶ 3. It was again discussed during a ride back from an Idaho bar on September 24th. CP 6; Williams, at ¶ 4. In the early morning of September 25th, the group discussed doing an "invasion style robbery" of

Cole in his motel room, but they decided against it because others were present. CP 6-7; Williams, at ¶ 4.

The group continued with the plan the night of September 25th. Williams procured a firearm. Knight met Cole and slept with him in his room. She then led him to the alley behind the motel where Williams would rob him. Williams shot Cole at that time, although the shooting was not part of the plan. CP 4-7; Williams, at ¶¶ 5-6.

The state charged Williams with five counts:

- I Conspiracy to Commit Second Degree Robbery;
- II Conspiracy to Commit First Degree Burglary;
- III Conspiracy to Commit First Degree Robbery;
- IV Attempted First Degree Robbery;
- V First Degree Felony Murder.

Williams, at \P 6.

On appeal, this Court agreed with Williams that only one conspiracy was committed. Citing <u>Bobic</u>, this Court held that where there is one plan, there is one conspiracy; "[i]t does not matter how many statutory violations the conspirators considered in the course of devising the plan." <u>Williams</u>, at ¶ 19 (citing Bobic, at 261).

Here, Mr. Williams and company hatched a plan to do "a lick" on Mr. Cole, and they took substantial steps toward bringing that about. For us, this is one crime which should result in one punishment. Nothing in this record suggests that more than one criminal transaction was planned. It was simply left up in the air where, how, and with what degree of force the property transfer would take place. But the agreement and the substantial steps contemplated a single

criminal enterprise and therefore establish a single criminal conspiracy.

Williams, at ¶20. The Court accordingly affirmed only one conspiracy count, count III, conspiracy to commit first degree robbery. This Court reversed counts I and II, which charged conspiracy to commit second degree robbery and first degree burglary. Williams, at ¶¶1, 22.

Williams is controlling. The underlying substantive facts are the same. As this Court held, there was only one conspiracy.

The only difference arises from the procedural facts. Knight pled guilty and assisted the state, while Williams forced the state to prove its case at trial. This distinction makes no legal difference, however, as Knight seeks vacation of count II and resentencing on counts I and III.⁴ This is the appropriate remedy for a double jeopardy violation, even where the convictions follow a guilty plea. Williams, at ¶1, 36; In re Restraint of Butler, 24 Wn. App. 175, 178, 599 P.2d 1311 (1979) (striking one count and resentencing on other where plea to both violated double jeopardy).

The last question is whether to vacate count I or count II. In Williams, this Court concluded this group of conspirators planned to rob

As Knight stated in her opening brief, and as she repeats here, she does not seek withdrawal of her plea. BOA at 3 n.3. The plea agreement instead permitted the parties to argue for "any sentence allowed by law," CP 35, and did not waive double jeopardy claims. CP 13-14; Menna v. New York, State v. Cox, Restraint of Butler, supra.

Cole and the potential burglary was simply one part of that plan. Williams, at ¶¶1, 22. Accordingly, the count II conviction should be vacated and case remanded with directions to resentence Knight for counts I and III.

As Knight argued in her opening brief, the count I offense only adds one point to her offender score for count III. BOA at 8. For that reason, when count II is stricken, she should be resentenced on counts I and III with an offender score of one point each. The correct count I range is 6-12 months, and the correct count III range is 134-234 months. RCW 9.94A.510, .520, .525. With the 60-month enhancement, the total count III range is 194-294 months.

The trial court imposed a sentence of 285 months, which was 10 months above the midpoint of the erroneously calculated range of 225-325 months. If the trial court imposed a similar sentence with the correct range, 10 months above the midpoint would be 254 months. The matter therefore should be remanded for the trial court to exercise its discretion in imposing a sentence within the correctly calculated range. BOA at 9-12.

D. <u>SUPPLEMENTAL CONCLUSION</u>

For the reasons stated above, the count II conviction should be vacated. And for the reasons stated above and in the opening brief, the trial court should resentence Knight on counts I and III with an offender score of one point each.

DATED this 2 day of February, 2006.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

ERIC BRŎMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

Appendix A

23698-6-III

FILED OCT 2 4 2003

STATEMENT OF INVESTIGATING OFFICER
AFFIDAVIT OF FA 103448 - 8

STATE OF WASHINGTON) COUNTY OF SPOKANE)

REPORT NUMBER: 03-316823

DEFENDANT:

Terrance L. Davis, BM, 8/26/82

Counts 1, 2 and 4

DEFENDANT:

Alyssa C. Knight, WF, 9/03/82

Counts 1, 2, 3 and 4

DEFENDANT:

Peter Michael Knypstra, WM, 10/22/83

Counts 2, 3 and 4

DEFENDANT:

Dione J. Williams, BM, 2/08/80

Counts 1, 2, 3 and 4

DEFENDANT:

Darian D. Ervin, BM, 9/30/79

Counts 1, 2, 3 and 4

The undersigned, a law enforcement officer, competent to testify, states as follows: That he/she believes a crime was committed by the above named defendant/defendants in the City and County of Spokane, State of Washington, because:

On 9/26/03 at 0308 hours Spokane Police were advised of a shooting in the area of Division/ Main, in the City and County of Spokane, State of Washington. Patrol officer discovered the body of a deceased BM on Division St, just north of Main. The male was transported to Sacred Heart Medical Center where he was pronounced dead on arrival. Preliminary examination of the body revealed a possible gunshot injury in the male's lower back.

Witnesses reported hearing multiple gunshots in the area of Division and Main, near the north alley on the west side. They observed a BM run into the street and collapse. A vehicle was seen leaving the area north bound, no further description.

While processing the scene, Det. Hollenbeck found a traffic citation issued on 9/25/03 at 2310 hours to Arren T. Cole, BM, 6/8/77. The vehicle listed on the citation was a 2003 Chev Trailblazer, CA license 4ZQF769. The vehicle was impounded by AR Towing and towed to 1808 E. Riverside.

In a jacket worn by the victim, found at the scene, Det. Hollenbeck located a key for room #211. Det. Tim Madsen contacted staff at the Travelodge, 33 W. Spokane Falls Blvd, and was advised that room #211 was currently being rented by a BM named Arren Cole. He checked into the room on 9/25/03. With Cole at the time the room was rented was a WF with long blonde hair. Hotel staff made a photocopy of Arren Cole's CA ID card. The person depicted on the ID card appeared to be consistent with the deceased. The deceased has not been positively identified at this time.

On 9/26/03 Det. Madsen viewed a report made by WSP Trooper. R. A. Spencer #1152 reference the traffic stop on Arren T. Cole. Listed as a passenger in the vehicle was Alyssa C. Knight, WF, 9/3/82. Det. Madsen interviewed Knight on 9/26/03 at approximately 1400 hours. Knight stated that she met Cole, whom she knew as Ghost, at Fast Eddies Tavern at Division/Spokane Falls Blvd on 9/25/03. She admitted being in the vehicle with Cole at the time of the traffic stop and accompanying him to the Travelodge when he checked into room #211. She stated she last saw him on 9/26/03 between 0245 and 0300 hours in the alley south of Fast Eddies after he had accompanied her there from his motel room. Knight stated she was picked up by her friend, Jenevra Iverson. She then left the area and ultimately returned to her home.

On 9/26/03 Det. Madsen and Det. Hollenbeck interviewed Kaitlin E. Walker. Walker stated she knew Jenevra Iverson, Alyssa Knight, Terrance Davis, Dione Williams and a WM known to her as Mike (Peter M. Knypstra, WM, 10/22/83.) On Tuesday, 9/23/03, Knight, Davis, Williams and Knypstra were on her patio discussing doing a "lick" (meaning a robbery.) The target of the robbery was a BM Knight had recently met, known as Ghost.

While Det. Madsen and Det. Hollenbeck were interviewing Walker, Jenevra Iverson and Terrance Davis walked into the residence. Det. Madsen detained Davis, advised him of his rights, which Davis chose to waive. Davis denied any knowledge of any robbery or homicide. He was transported to the Public Safety Building and detained as a possible homicide suspect.

Jenevra Iverson detectives that she had also observed Knight, Davis, Williams and the WM known to her as Mike (Knypstra) on the front porch of Walker's residence. She heard them discussing a robbery with Ghost (Cole) as the target. On 9/26/03 Alyssa Knight advised Iverson that Knight had been dropped off at Fast Eddies the previous evening. That she accompanied Cole to distract him while Dione Williams and Mike (Knypstra) waited for him to rob him. In the course of the robbery, Williams shot Cole and Knypstra drove the vehicle from the scene.

On 9/26/03 Det. Madsen and Det. Hollenbeck re-contacted Alyssa Knight at approximately 2051 hours. She was arrested for First Degree Murder and advised of her rights which she chose to waive. Knight advised Det. Madsen that on Tuesday, 9/23/03, Terrance Davis came up the with the idea to rob Ghost (Cole) after Knight had commented that he appeared to have a lot of money. Dione Williams was also involved in the discussions to commit the robbery. Knight said, "The gun was to be used for intimidation." Mike (Knypstra) heard about the robbery plans and wanted to be involved. On 9/26/03 at approximately 2330 hours she met Cole at Fast Eddies Tavern, ultimately accompanying him to his motel room, had sex with him, in the course of which she also received a cell phone call from Williams, advising that he and Knypstra were prepared to do the robbery. They were waiting for her to bring the victim down the alley, south of Fast Eddies. Knight stated that Williams did not contact Terrance Davis, believing Davis would not follow through with the actual robbery.

Knight admitted walking Cole down the alley so that Williams and Knypstra could rob Cole. She noticed they were not in position and telephoned Williams. She continued to delay Cole in the alley by kissing him and talking to him until she saw Williams arrive, driving her Ford Explorer. She kissed Cole goodnight, passing Williams as he approached Cole. As she got into the Explorer, she heard two gunshots and moments later Williams got into the vehicle, yelling at Knypstra to go. As they pulled east bound on Main, across Division, she saw Cole's body lying on Division.

On 9/27/03 Sgt. Joe Peterson and Det. Kip Hollenbeck arrested Peter Michael "Mike" Knypstra, who was advised of his rights and waived them. Knypstra admitted seeing Dione Williams shoot Arren Cole. Knypstra admitted being the driver of the Explorer as it fled the area east bound on Main and to seeing the victim's body lying on Division.

On 9/28/03 at approximately 1500 hours Dione J. Williams turned himself in to the Spokane Police Department.

On 10/1/03 the Spokane Dive Team recovered a stainless steel Smith and Wesson .38 caliber revolver, ser# R2453, from the Spokane River. WSP scientist Ed Robinson confirmed that it was the weapon which fired the bullet recovered from Cole's body.

On 10/8/03 Peter Michael Knypstra and his attorney, Tracy Collins, arrived at the Public Safety Building. Det. Tim Madsen and Sgt. Joe Peterson interviewed Knypstra in the presence of his attorney. During the course of the interview, Knypstra advised on 9/24/03 he was riding back from a bar in Post Falls, ID, called the Grail. He was riding with Darien Ervin who goes by the name HP. He heard Ervin talking to Alyssa Knight on the cell phone. He heard Ervin give Knight suggestions on how she could set up Cole for a robbery. Ervin suggested Knight should sleep with Cole to determine whether or not he would be armed with a firearm and how much money he had.

On 9/25/03 in the early morning hours, Knypstra and Ervin met Alyssa Knight and Dione Williams in the parking lot of the Travelodge, W. 33 Spokane Falls Blvd., where Cole was staying. Knight had just left Cole and reported he was up in his room with

other persons. Knight, Williams and Ervin were discussing whether or not they should do an invasion style robbery of the motel room. Ervin suggested against it, since Cole was not alone. Ervin also told Williams that Williams would need a firearm and that Ervin could supply it.

On 9/25/03 at approximately 2030 hours, Knypstra was at 1506 W. Cora Ct with Terrance Davis, Alyssa Knight, Dione Williams, Jenevra Iverson and Katie Walker. Alyssa Knight and Dione Williams were talking about their plans to rob Cole that evening. Knight was going to meet Cole at a club that evening. Cole was reportedly going to be alone. Dione Williams stated that he was going to "do the lick", meaning robbery, and that Cole would have a large amount of money.

At approximately 2200 hours Knypstra and Terrance Davis met Darien Ervin and Dione Williams at an apartment located near Hamilton/Sinto. The apartment belonged to one of Ervin's girlfriends, who was not present. Williams and Ervin were talking about the planned robbery against Cole. Knypstra saw Ervin show Williams a silver revolver, which Ervin had acquired for Williams. While demonstrating how to use the revolver, Ervin accidentally fired the gun in the apartment, striking a wall in a bedroom. Ervin gave the revolver to Williams for use in the robbery against Cole.

Knypstra admitted that he agreed to assist Williams in the robbery of Cole, hoping to get money after the robbery was completed. He stated he saw Williams throw the revolver off the Maple Bridge, crossing over the Spokane River. Sgt. Peterson showed Knypstra a photograph of a Smith and Wesson .38 caliber revolver, which was recovered from the river by the Spokane Dive Team. Knypstra identified it as looking like the same gun Ervin gave to Williams.

Based on the above facts and circumstances, your affiant believes that (count 1, conspiracy to commit robbery) on 9/23/03 Terrance L. Davis, Alyssa C. Knight and Dione J. Williams began planning to rob Arren T. Cole of money. On 9/24/03 to 9/25/03 at 0230 hours, Darian D. Ervin also became involved in the plot to rob Cole. All four took a substantial step by meeting in the Travel Lodge parking lot, W. 33 Spokane Falls Blvd. Preparing to do a motel room invasion style robbery. (Count 2, conspiracy to commit first degree robbery) that on 9/25/03 at 2030 hours until 9/26/03 at 0300 hours Davis, Knight, Williams, Ervin and Knypstra discussed committing an armed robbery against victim Cole and were involved in the preparations for the robbery. (Count 3, attempted first degree robbery) that on 9/26/03 Knight, Williams and Knypstra acting in concert, did attempt to rob Arren Cole of money with use of a firearm. (Count 4, first degree murder) While attempting to rob Cole of money, Dione J. Williams did shoot and cause the death of Arren T. Cole in the course of the robbery.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (9A.72.085)

DATE 10/703 PLACE Spokane, WA SIGNATURE - H MADSEN SE

Appendix B

23698-6-III



2006 WL 224278

(Publication page references are not available for this document.)

Court of Appeals of Washington,
Division 3,
Panel One.
STATE of Washington, Respondent,
v.
Dione Jamaal WILLIAMS, Appellant.
No. 23124-1-III.

Jan. 31, 2006.

Background: Defendant was convicted by jury in the Superior Court Spokane County, <u>Jerome J. Leveque</u>, J., of three counts of conspiracy and one count each of attempted robbery and felony murder. Defendant appealed.

Holdings: The Court of Appeals, Sweeney, J., held that:

- (1) coconspirator's out-of-court statements were admissible;
- (2) evidence was sufficient to support only one conspiracy conviction; and
- (3) attempted robbery conviction merged with conviction for felony murder.

Affirmed in part, reversed in part, and remanded.

[1] Criminal Law 6 422(1)

110k422(1) Most Cited Cases

[1] Criminal Law 662.11 110k662.11 Most Cited Cases

Out-of-court statements of felony-murder defendant's coconspirator, made during conspiracy and before he was in custody, were not testimonial under <u>Crawford</u> <u>v. Washington</u>, and were admissible against defendant under conspiracy exception to hearsay rule. ER 801(d)(2)(v).

[2] Conspiracy \$\infty\$47(11)

91k47(11) Most Cited Cases

Evidence that defendant and others agreed to do "a lick" on victim, without agreeing to degree of force to be used to take property from victim, and that they took substantial steps toward effectuating plan, was sufficient to support conviction for conspiracy to commit first degree robbery, but not additional convictions for conspiracy to commit second degree robbery or conspiracy to commit burglary. West's RCWA 9A.28.040.

[3] Criminal Law 1144.13(4) 110k1144.13(4) Most Cited Cases

[3] Criminal Law 1144.13(5)

110k1144.13(5) Most Cited Cases

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences to be drawn from that evidence.

[4] Criminal Law 561(1)

110k561(1) Most Cited Cases

Evidence is sufficient to support a conviction if a reasonable jury could have found the essential elements of the crime beyond a reasonable doubt.

[5] Conspiracy 24(1)

91k24(1) Most Cited Cases

Conviction for conspiracy to commit second degree robbery and burglary did not require that all conspirators agree to each element of plan at same time. West's RCWA 9A.28.0400.

[6] Conspiracy \$\infty\$23.1

91k23.1 Most Cited Cases

A "conspiracy" is a plan to carry out a criminal scheme together with a substantial step toward carrying out the plan. West's RCWA 9A.28.040.

[7] Conspiracy 24(1) 91k24(1) Most Cited Cases

[7] Conspiracy \$\infty\$ 24(2)

91k24(2) Most Cited Cases

The punishable criminal conduct in conspiracy is the plan; if there is one plan, there is one conspiracy, no matter how many statutory violations the conspirators considered in the course of devising the plan. West's RCWA 9A.28.040.

[8] Conspiracy 24.10

91k24.10 Most Cited Cases

Conspiracy is an inchoate crime, not a completed crime. West's RCWA 9A.28.040.

[9] Criminal Law 530

110k30 Most Cited Cases

Attempted robbery was integral to defendant's shooting and killing of victim while victim attempted to flee such that conviction for attempted robbery

merged with conviction for felony murder predicated on attempted robbery.

West's RCWA 9A.32.030(1)(c).

[10] Criminal Law \$\infty\$ 1139

110k1139 Most Cited Cases

Whether the merger doctrine bars double punishment for two offenses is a question of law that is reviewed de novo.

[11] Criminal Law 530

110k30 Most Cited Cases

Two offenses merge if to prove a particular degree of crime, the State must prove that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.

<u>David N. Gasch</u>, Attorney at Law, Spokane, WA, for Appellant.

<u>Kevin M. Korsmo</u>, <u>Andrew J. Metts</u>, Attorneys at Law, Spokane, WA, for Respondent.

SWEENEY, J.

¶ 1 Conspiracy is an inchoate crime. And so our focus is on "the conspiratorial agreement, not the specific criminal object or objects." State v. Bobic. 140 Wash.2d 250, 265, 996 P.2d 610 (2000). Here, a group of friends including Dione J. Williams planned to "do a lick." Witnesses at his trial variously described this as whatever was necessary to relieve a victim of his valuables. A female member of the group lured Arren Cole to a downtown Spokane alley late at night. Mr. Williams tried to rob Mr. Cole at gunpoint. He then shot him in the back as Mr. Cole tried to flee. A jury found Mr. Williams guilty of three counts of conspiracy, and one count each of attempted robbery and felony murder. The evidence supports one conspiracy conviction. We affirm on count III for conspiracy to commit first degree robbery. We reverse the conspiracy convictions on counts I and II for second degree robbery and first degree burglary. We also conclude that the attempted robbery count merged into the felony murder because it was the predicate offense. We then reverse the attempted robbery conviction. The State concedes that the firearm enhancement cannot stand. We remand for resentencing.

FACTS

¶ 2 Dione J. Williams was one of a group of people who socialized together. A woman in the group, Alyssa Knight, met Arren Cole, a reputed gang member visiting Spokane from Los Angeles.

- ¶ 3 Between Tuesday and Thursday, September 23-25, 2003, the group gathered at their usual hangouts, including the home of Kaitlin Walker and a tavern called The Grail in Post Falls, Idaho. Ms. Knight told Mr. Williams, Darian Ervin, and others that Mr. Cole was carrying money, jewelry, and drugs. They decided to "do a lick" [FN1] on Mr. Cole. Precisely what they meant by this was disputed. It appears from this record, however, that to "do a lick" means to take someone's valuables by any available means. Their discussions of various methods of doing this extended over several days.
- ¶ 4 They first planned to rob Mr. Cole on Tuesday night. This fell through when Ms. Knight reported that Mr. Cole might be carrying a gun. Mr. Ervin said he would get a gun so that Mr. Williams could take Mr. Cole the following night. On Wednesday, Ms. Knight, Mr. Williams, and Mr. Ervin discussed the impending "lick" and considered various strategies and tactics while driving from Post Falls to Spokane. But the crime had to be postponed again.
- ¶ 5 On Thursday, Ms. Knight met Mr. Cole by arrangement at a downtown Spokane bar. Mr. Williams was also in the bar. Ms. Knight told Mr. Williams that Mr. Cole was carrying a lot of money and jewelry. Ms. Knight then went with Mr. Cole to his hotel room. Some time later, Mr. Cole accompanied Ms. Knight down to the alley behind his hotel to wait for her ride.
- ¶ 6 As planned, Mr. Williams arrived in a car driven by Mike Knypstra. Ms. Knight got in the car and Mr. Williams got out. As Mr. Williams approached Mr. Cole, Mr. Williams put his hand in his pocket and said something to him. Mr. Cole backed away. Mr. Williams then pulled the gun from his pocket. Mr. Cole turned and started running down the alley. Mr. Williams shot him in the back. Mr. Knypstra drove Mr. Williams to the Maple Street Bridge where they threw the gun into the Spokane River. The police later recovered the gun. Mr. Williams was arrested and charged with conspiracy to commit second degree robbery (count I); conspiracy to commit first degree burglary (count II); conspiracy to commit first degree robbery (count III); attempted first degree robbery (count IV); and first degree (felony) murder (count V). A jury found Mr. Williams guilty on all counts. The jury also found that Mr. Williams was armed with a deadly weapon on counts III through V.
- ¶ 7 At sentencing, Mr. Williams argued that all three conspiracy counts were based on the same criminal

conduct and supported only one punishment. He also argued that the attempted robbery count was the predicate offense for the felony murder, so the two offenses merged. The court denied the motions and sentenced Mr. Williams on all counts with five-year firearm enhancements on counts III through V.

DISCUSSION

CRAWFORD VIOLATION

- [1] ¶ 8 Mr. Williams first challenges the admission of statements by his coconspirator, citing <u>Crawford v. Washington</u>, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
- ¶ 9 Mr. Ervin was a coconspirator and he faced a separate prosecution. He did not appear at Mr. Williams' trial because he was an untried, severed codefendant and therefore, of course, had the right to remain silent. Mr. Ervin made out-of-court statements that fall into two categories. He made statements to various people during the conspiracy. They testified at Mr. Williams' trial. Mr. Ervin also gave what was described by defense counsel as a "free-talk" confession after his arrest in which he implicated Mr. Williams. Report of Proceedings (Vol.I) at 31. He said that Mr. Williams admitted to him that he shot Mr. Cole.
- ¶ 10 Mr. Williams contends that all of Mr. Ervin's statements--including those made during the conspiracy--should have been excluded under <u>Crawford</u>. That case holds that testimonial statements, that is statements the declarant would reasonably expect to be used in a future trial, are inadmissible unless the declarant is available for cross-examination. The State responds that <u>Crawford</u> does not apply to the conspiracy statements because they were not testimonial and were admissible under the coconspirator hearsay exception of <u>ER</u> 801(d)(2)(v).
- ¶ 11 The trial court based its decision solely on application of a court rule to specific undisputed facts. So the question whether the court rule (ER 801) applies is a question of law we review de novo. <u>State v. Tatum</u>, 74 Wash.App. 81, 86, 871 P.2d 1123 (1994). The trial court correctly admitted statements made during and in furtherance of the conspiracy under <u>ER 801(d)(2)(v)</u>. It provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. <u>ER 801(d)(2)(v)</u>. Mr. Ervin's custodial statements were neither offered nor admitted. The confrontation clause was not then implicated in the admission of

Mr. Ervin's statements. <u>Crawford</u>, 541 U.S. at 51, 124 S.Ct. 1354.

CONSPIRACY CONVICTIONS

[2] ¶ 12 Mr. Williams challenges his conviction for and sentencing on two of the three counts of criminal conspiracy.

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.

RCW 9A.28.040(1). The two challenged conspiracies are count I (conspiracy to commit second degree robbery) and count II (conspiracy to commit first degree burglary). Mr. Williams does not challenge his conviction of count III (conspiracy to commit first degree robbery).

- ¶ 13 Mr. Williams challenges the sufficiency of the evidence to prove any conspiracy other than the conspiracy to commit first degree robbery. But if multiple conspiracy convictions stand, Mr. Williams contends they are the same criminal conduct for sentencing purposes. The State responds that the evidence, including circumstantial evidence, when viewed most favorably to the prosecution, is sufficient to support multiple conspiracy convictions and to support a separate sentence for each.
- [3][4] ¶ 14 A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences to be drawn from that evidence. <u>State v. Salinas</u>, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a conviction if a reasonable jury could have found the essential elements of the crime beyond a reasonable doubt. <u>State v. Green</u>, 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980).
- ¶ 15 To convict Mr. Williams on count III, conspiracy to commit first degree robbery, the jury had to find that he planned to arm himself with a deadly weapon, or to display what appeared to be a deadly weapon, or to inflict bodily injury upon Mr. Cole, either while robbing him or in immediate flight from doing so. RCW 9A.56.200. To sustain an additional conspiracy conviction on count I (conspiracy to commit second degree robbery), the evidence must show that Mr. Williams and his associates also planned to take personal property from Mr. Cole's person or in his presence, against his will, by the use or threatened use of immediate force

- or violence. <u>RCW 9A.56.190</u>, .210. For the conviction on count II (conspiracy to commit first degree burglary) to stand, the evidence must additionally establish a plan to enter or remain unlawfully in Mr. Cole's hotel room with intent to commit a crime there, either while armed with a deadly weapon or by assaulting him. <u>RCW 9A.52.020</u>.
- [5] ¶ 16 Mr. Williams contends that the evidence did not show that all the elements of the second degree robbery and burglary (counts I and II) were agreed to at precisely the same point in the planning. For instance, at the moment the group agreed to relieve Mr. Cole of his money and valuables, they were not necessarily contemplating the use of force; the means might have been seduction, intoxication, or other nonviolent methods. Conversely, when they did talk about using force, the agreement to take Mr. Cole's property had already been made. We reject this argument.
- ¶ 17 Mr. Williams offers no authority for the view that a conspiracy requires that all the criminal elements of the plan must be proposed at the same instant in time. Nor does he explain why a planned criminal enterprise that evolves over time should be treated differently than one that is fully formed at the outset.
- ¶ 18 The State's evidence was sufficient to sustain a conviction for conspiracy to commit robbery. Several witnesses testified that to "do a lick" means to rob someone. Some testified that "a lick" could also be theft including theft by deception. But the jury could find that this particular plan was to take Mr. Cole's property from his person or in his presence, with Mr. Williams possibly rushing and disarming Mr. Cole if necessary. The evidence included a plan to commit all the statutory elements of robbery. This was sufficient to prove conspiracy as charged either in count I or count III. But not both, because as we will explain <u>Bobic</u> says one plan, one count. <u>Bobic</u>, 140 Wash.2d at 261, 996 P.2d 610.
- [6][7] ¶ 19 A conspiracy is a plan to carry out a criminal scheme together with a substantial step toward carrying out the plan. \underline{Id} at 262, 996 P.2d 610. The punishable criminal conduct is the plan: one plan, one conspiracy. \underline{Id} . It does not matter how many statutory violations the conspirators considered in the course of devising the plan. \underline{Id} at 264-65, 996 P.2d 610. By whatever means this "lick" was to be accomplished, the nature and extent of the conspiracy lies in " 'the agreement which embraces and defines

- its objects.' " <u>Id.</u> (quoting <u>Braverman v. United</u> <u>States</u>, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942)).
- ¶ 20 Here, Mr. Williams and company hatched a plan to do "a lick" on Mr. Cole, and they took substantial steps toward bringing that about. For us, this is one crime which should result in one punishment. Nothing in this record suggests that more than one criminal transaction was planned. It was simply left up in the air where, how, and with what degree of force the property transfer would take place. But the agreement and the substantial steps contemplated a single criminal enterprise and therefore establish a single criminal conspiracy.
- [8] ¶ 21 Conspiracy is an inchoate crime, not a completed crime. Bobic, 140 Wash.2d at 265, 996 P.2d 610. Therefore, any number of acts in the days preceding the climax here could be labeled the substantial step that completed the crime of conspiracy. Id. (citing State v. Dent, 123 Wash.2d 467, 476, 869 P.2d 392 (1994) (citing Ira P. Robbins, Double Inchoate Crimes, 26 HARV. J. ON LEGIS. 1, 27-29 (1989) and 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.5, at 95 (2d ed.1986))). For this reason, the defendant is not required to prove that a particular substantial step established one possible criminal element of the scheme and not another in order to avoid multiple punishments for the same criminal conduct. Bobic, 140 Wash.2d at 265, 996 P.2d 610.
- ¶ 22 The record supports only one conspiracy conviction—that for count III, conspiracy to commit first degree robbery.

MERGER

- [9] ¶ 23 Mr. Williams argues that, to convict him of first degree murder, the State had to prove that he committed or attempted to commit first degree robbery. And here it did that by proving that he killed the victim in furtherance of, or in immediate flight from the separately defined crime of robbery or attempt. The shooting was then part of the robbery attempt and inextricably related. So attempted robbery merges with first degree murder.
- ¶ 24 The State responds that the predicate offense does not merge into felony murder if it is factually disconnected or serves a different purpose or intent. And it says that is the case here.
- ¶ 25 The State cites State v. Peyton as an example of

a factual disconnect between a robbery and a felony murder based on the robbery. State v. Peyton, 29 Wash.App. 701, 630 P.2d 1362 (1981). There, after a completed bank robbery, the robbers fled in one vehicle, abandoned it, fled again in another vehicle, then shot a law enforcement officer in a gunfight. The robbery did not merge with the homicide because it was disconnected in time, place, and circumstances. Id. at 720, 630 P.2d 1362. Moreover, the State continues, the crimes do not merge if they are committed with a different intent. Robbery and murder have different intents. The intent of robbery is to take something. The intent of murder is to kill. Therefore, merger does not apply to felony murder based on the predicate crime of robbery. Finally, the State contends that there is "no connection between the two crimes other than the obvious commonality of defendant and victim." Resp't's Br. at 27.

- [10][11] ¶ 26 Whether the merger doctrine bars double punishment is a question of law that we review de novo. State v. Zumwalt, 119 Wash.App. 126, 129, 82 P.3d 672 (2003), aff'd sub nom. State v. Freeman, 153 Wash.2d 765, 108 P.3d 753 (2005). The two offenses merge if to prove a particular degree of crime, the State must prove that the crime "was accompanied by an act which is defined as a crime elsewhere in the criminal statutes." State v. Vladovic, 99 Wash.2d 413, 419 & n. 2, 662 P.2d 853 (1983).
- ¶ 27 We then look to the statutory elements of each crime to determine whether the legislature intended to impose a single punishment for a homicide committed in furtherance of or in immediate flight from an armed robbery. <u>Id.</u> The offenses merge if the essential elements of the homicide include all the elements of the robbery, such that the facts establishing one necessarily also establish the other. <u>Id.</u> at 420-21, 662 P.2d 853; <u>Zumwalt</u>, 119 Wash.App. at 131, 82 P.3d 672; <u>State v. Johnston</u>, 100 Wash.App. 126, 138, 996 P.2d 629 (2000).
- ¶ 28 Here, Mr. Williams was convicted of felony first degree murder as defined by <u>RCW 9A.32.030(1)(c)</u>. The elements expressly require an associated conviction for another crime:
 - (1) A person is guilty of murder in the first degree when:
 - (c) He or she commits or attempts to commit the crime of ... (1) robbery in the first or second degree ... and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person

other than one of the participants.

RCW 9A.32.030. In order to find Mr. Williams guilty of first degree murder, then, the jury had to find him guilty of attempted first degree robbery and of killing Mr. Cole in the course of or in furtherance of or in immediate flight from that attempt. RCW 9A.32.030(1)(c)(1). A separate conviction for the predicate crime is, therefore, contrary to the legislative intent and the offenses merge. State v. Johnson. 92 Wash.2d 671, 676, 600 P.2d 1249 (1979).

- ¶ 29 The attempted robbery would not merge only if it was "merely incidental" to the homicide. <u>Vladovic, 99 Wash.2d at 421, 662 P.2d 853.</u> That is not the case here. The robbery was integral to the killing. The shooting had no purpose or intent outside of accomplishing the robbery or facilitating Mr. Williams' departure from the scene.
- \P 30 The felony murder statute specifically includes attempted first degree robbery as a predicate crime. RCW 9A.32.030(1)(c)(1). If, as the State suggests, the jury found the attempted robbery was complete when Mr. Williams took some undefined substantial step earlier in the evening, then it could not have found that the shooting was in furtherance of or in flight from that attempt. And the first degree murder conviction could not stand. Likewise, the State's assertion that the two crimes were completely unrelated is inconsistent with the felony murder charge.
- ¶ 31 The State cites <u>In re Personal Restraint of Fletcher</u> for the proposition that criminal acts with a different purpose and effect do not merge. <u>In re Pers. Restraint of Fletcher</u>, 113 Wash.2d 42, 776 P.2d 114 (1989). <u>Fletcher</u> is distinguishable. It is not a felony murder case. And the lesser offense in that case was not an essential element of the greater offense. <u>Id.</u> at 52, 776 P.2d 114.
- ¶ 32 Count IV, attempted first degree robbery, merged with count V, first degree murder.

Firearm Enhancement-Blakely Violation

¶ 33 The information alleges that Mr. Williams was armed with a firearm for counts III, IV, and V. Clerk's Papers (CP) at 2. But the special verdicts ask only whether he had a deadly weapon. CP at 153-55. A deadly weapon enhancement adds two years, RCW 9.94A.533(4)(a), while a firearm enhancement adds five mandatory years, RCW 9.94A.533(3)(a).

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(Publication page references are not available for this document.)

¶ 34 The State concedes Mr. Williams' contention that a sentencing enhancement for a firearm requires a jury finding of a firearm; a deadly weapon finding is not enough. This is the holding, on essentially the same facts, of <u>State v. Recuenco</u>, 154 Wash.2d 156, 160, 110 P.3d 188 (2005) (citing <u>Blakely v. Washington</u>, 542 U.S. 296, 124 S.Ct. 2531, 159 <u>L.Ed.2d 403 (2004)</u>), cert. granted, --- U.S. ----, 126 <u>S.Ct. 478</u>, 163 L.Ed.2d 362 (2005). And while it would seem that the harmless error doctrine would easily accommodate this error, that is not the holding in *Recuenco*.

¶ 35 We therefore remand for resentencing.

HOLDING

¶ 36 We affirm count V, the conviction for first degree murder. We reverse count IV, the conviction for attempted first degree robbery, because it merges with the first degree murder conviction. The evidence is sufficient to support only one conspiracy conviction, that for count III, conspiracy to commit first degree robbery. We accordingly affirm count III and reverse counts I and II. Finally, at resentencing, the verdict supports an enhancement for a deadly weapon, not a firearm.

WE CONCUR: KATO, C.J., and BROWN, J.

<u>FN1.</u> See, e.g., Report of Proceedings at 227, 231-32.

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